

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District <u>Eastern District of Texas Beaumont</u>	
Name (under which you were convicted): <u>Vicki Stark-Fitts</u>		Docket or Case No.: <u>1:12-cr-00119-MAC-29H-4</u>	
Place of Confinement: <u>FMC Carswell, PO Box 27137, Fort Worth, TX</u>		Prisoner No.: <u>18614-078</u>	
UNITED STATES OF AMERICA		Movant (include name under which you were convicted) <u>v. Vicki Stark-Fitts</u>	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

United States District Court
Eastern District of Texas
Beaumont Division

(b) Criminal docket or case number (if you know): 1:12-cr-00119-MAC-29H-4

2. (a) Date of the judgment of conviction (if you know): 3-5-2014

(b) Date of sentencing: 3-5-2014

3. Length of sentence: 378 months Imprisonment

4. Nature of crime (all counts):

Stark-Fitts was charged in a Criminal Information with
One Count of Racketeering (RICO) in violation of
18 USC § 1962(c).

5. (a) What was your plea? (Check one)

(1) Not guilty ☐

(2) Guilty ☒

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

N/A

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☐

Judge only ☒

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☐ No ☒
9. If you did appeal, answer the following:

(a) Name of court: *U.S. Court of Appeals Fifth Circuit*

(b) Docket or case number (if you know): *14-40625*

(c) Result: *Dismissed*

(d) Date of result (if you know): *8/25/2014*

(e) Citation to the case (if you know): *US v Stark-Fitts, (No. 14-40625) (5th Cir. Aug 25, 2014)*

(f) Grounds raised:

*N/A Out of time appeal was dismissed.
No briefs were filed.*

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐

No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): *N/A*

(2) Result: *N/A*

(3) Date of result (if you know): *N/A*

(4) Citation to the case (if you know): *N/A*

(5) Grounds raised:

N/A

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: *N/A*

(2) Docket or case number (if you know): *N/A*

(3) Date of filing (if you know):

- (4) Nature of the proceeding: N/A
(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

- (1) Name of court: N/A
(2) Docket or case number (if you know):
(3) Date of filing (if you know): N/A
(4) Nature of the proceeding: N/A
(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly

why you did not: *Attorney failed to advise or consult stark-fits about a direct appeal. Also out of time appeal was dismissed*

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: *Ineffective Assistance of Counsel during plea negotiations & at sentencing regarding RICO charge.*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

a) The Government never established by competent evidence "pattern of racketeering activity." such pattern is established where it is shown that defendant conspired over a period of years to perform illegal acts, based on the facts that I only knew of them for 6 months & was around Bourque for 6-8 weeks. which is not enough time to form a pattern of racketeering activity. (next pg)

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

N/A

Type of motion or petition:

N/A

Name and location of the court where the motion or petition was filed:

N/A

Ground One:

B) Did not establish a closed-end or open ended pattern of racketeering.

Docket or case number (if you know):

N/A

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

N/A

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

N/A

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

Defendants attorney failed to file direct appeal & when granted an out of time appeal defendants attorney filed an Anders Brief.

GROUND TWO:

Ineffective Assistance of Counsel at sentencing, failing to object to agreed parts of plea change.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Failed to even object when AUSA Ross changed his mind as to agreement made verbally 5 days prior to sentencing that defendant should not be raised a category and should receive all back time to date of arrest due to being able to plea all charges at one time ~~had~~ since it was all one arrest.

John pled to 922a, Did not know she was a convicted felon as described in Rehaif and the other charge was undecided if it would be given to Stark-Fitts so it was already pending.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know):

N/A

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

N/A

Date of the court's decision:

N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

GROUND THREE: *Ineffective Assistance of Counsel.*
as to 922g charge under Rehab. Actual Innocence

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

I was promised verbally that I would not be - raised a level and would receive back time to date of arrest if they later decided to charge me with any more charges, which they did a year after I pled they took me back & charged me with RCD. I did not qualify for the 922g charge as I was given probation & drug treatment before violating & receiving 6 months in state jail. Did not know I was a felon.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

N/A

Date of the court's decision:

N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

GROUND FOUR:

Ineffective Counsel by not making sure I received SKI or Rule 35 promised to me.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

I admitted to my crime and assisted as much as possible and was promised a SKI then at sentencing John Ross came in court room & said I would not be receiving a SKI but he anticipated a Rule 35 & would go on record as such would happen. My attorney assured me it would happen months after sentencing.

Then, the AUSA never followed thru & my attorney died of disease he was diagnosed with while representing me but never disclosed to me, only to AUSA Ross.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

N/A

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Rehaif 922g charge which increased my category and added 3 criminal history points - Due to Rehaif being decided in 2020.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

Albert Charanya / Steven Rosen
(AC) S.R.

(b) At arraignment and plea:

A.C.

(c) At trial:

AC

S.R.

(d) At sentencing:

AC

S.R.

(e) On appeal: N/A

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:

Kimberly Keller ~~A/A~~

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

was given the right to file out
of time appeal. (Direct Appeal)
It was dismissed & give me
the right to file a new
2255.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

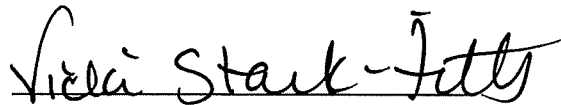
Therefore, movant asks that the Court grant the following relief:

Give me back time to date of arrest &
Dismiss 922(g) charge & Resentence defendant.
or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on
(month, date, year).

Executed (signed) on _____ (date).



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Brief:

Ground One: Pattern of Racketeering Activity

A.) Pattern of Racketeering Activity
 Government is required to establish competent evidence "pattern of racketeering activity" such pattern is established where it is shown that defendants conspired over period of years.
 US v Garver, 809 F.2d 1297, 22 Fed.R.Evid. Serv. (COC) 464 (7th Cir 1987)

B) They did not allege closed-ended or open-ended continuity.
 Grimes v Fremont Gen. Corp. 785 F.Supp. 2d 269 (S.D.N.Y. 2011), dismissed, 933 F.Supp. 2d 584 (S.D.N.Y. 2013)

Failed to satisfy continuity element of pattern, because, ① alleged racketeering activity took place over course of approximately 2 1/2 months, from Jan 2011 - March 27, 2011)

② while predicate acts perpetrated were not related, and there was no allegation that they were committed continuously during that time span.

③ alleged only one act was being perpetrated by individual thru enterprise. 524 Fed Appx 924 (4th Cir 2013)

Pattern of Racketeering Cont!

Continuity prong of pattern of racketeering activity required for violation under 18 USC § 1962 may be shown either by closed period of racketeering conduct extending over substantial period of time, or by open-ended period of racketeering conduct that amounts to threat of continued racketeering activity.

Office Outfitters v. A.B. Dick Co.,
83 F Supp. 2d 772, 110 Bus. Wisp.
Guide 97 9870 (E.D. Tex 2000).

Ground One² Murder Guideline Used

① Did not qualify to be sentenced under Murder guidelines.

First degree Murder relevantly defined as ① Killing a human being ② with specific intent to kill or to inflict great bodily harm ③ where victim WAS under 12.

Defendant was home in bed asleep when murder was committed & did not know of ANY crime until the next day.

Therefore the violation for R/C Charge ① does not apply to her. of First Degree Murder.

Defendant does not meet the Criteria for first degree murder should have been charged with lesser degree or aiding & abetting after the fact.

Murder Guideline:

If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted.

Departure should be based on the defendant's state of mind (recklessness, negligence) the degree of risk inherent in the conduct.

In this case defendant was unaware of any murder being committed until the next day & out of fear for her life & her 14 year old daughter's life she was negligent in not notifying the authorities. The defendant was not let out of Bouqure eyesight until arrest & he kept her phone if she went to restroom or other. I believe this would entitle defendant to a lesser guideline.

Ground 2: Concurrent Federal Sentences

When a federal sentence is given and other federal charges are pending or being discussed to be given to defendant they must be run concurrent. Defendant served 33 months on § 229 & at time was promised if additional charges were filed against her it would run concurrent & she would receive all backtime to date of arrest & would not be raised a category as she could have pled it all at one time.

US v Almonte-Reyes, US Court of Appeals for the First Circuit
 814 F.3d 24; 2016 US App. Lexis 2791
 No: 13-1934, February 18, 2016 decided.

814 F.3d 25) Lynch, Circuit Judge.
 In this case first impression in this circuit, we face a question the Supreme Court expressly left open

in Setzer v United States 132 S. Ct. 1463, 182 L. Ed. 2d 455 (2012): whether a federal sentence may be ordered to be consecutive to another federal sentence that is anticipated but not yet imposed. We conclude that it may not. We reverse and remand for resentencing.

In this case defendant was incarcerated and awaiting charges related to RICO charge. Was told by ASBA Randall Luke an attorney Albert Charanya Jr. that they were unsure if I would be brought in as part of that charge. That I could plea to 922g & if later they decided to move forward on defendant being part of RICO that def would not be raised a category & would be given ~~back~~ time to date of arrest. She pled to 33 months in 2012 & in 2013, they writted her ~~back~~ to charge her with RICO. So it was clearly a charge that was anticipated.

Ground 3:

Actual Innocence:

Due to belief defendant was innocent of 922g charge because she was sentenced to probation & drug treatment and later revoked & was only sentenced to 6 months State Jail Facility.

US Ct of Appeals for 10th Circuit held that defendant's sentence for a drug conviction under Kansas law was 32 months, (in defendant's case in Texas was 24 months) which is maximum potential term of imprisonment, to a drug treatment program & probation, in lieu of prison, did not render that conviction a felony for purposes of felon-in-possession of a firearm under Federal law - 18 USC § 922(g)(1).

In this case the defendant was sentenced to 2 years probation & in a residential drug treatment program in Harris County Jail. She then was removed from the program due to medications she was on. She then revoked her probation & only received 6 months in a State jail. She is therefore claiming actual innocence because her conviction was not punishable by over a year in prison as required for a violation of 922(g).

A showing of actual innocence can overcome a procedural default. *US v Powell*, 159 F.3d 500 (10th Cir 1998)
US v Benton, 988 F.3d 1231 (10th Cir 2021)
 stating only applies if he had knowledge of his relevant (prohibited) status at the time she actually possessed them.

The Court further explained that a crime is punishable by "the maximum amount of prison time a particular defendant could have received." *US v Brooks*, 751 F.3d 1204 (10th Cir 2014)

not some hypothetical defendant who could have been subject to imprisonment for more than a year when he possessed them.

Finally, in determining whether he could have been imprisoned for over a year when he possessed them, only his "record of conviction" is considered, the Court explained *Carachuri-Rosendo v Holder*, 560 US 563 (2010),

therefore "possession of firearms didn't constitute a crime under 922(g). *US v Williams* 5 F.4th 973 (9th Cir 2021) (a state crime is not punishable by imprisonment for more than a year "when the statutory maximum sentence exceeds one year but the maximum sentence allowed under the states mandatory sentencing guidelines does not.") *US v McAdory*, 935 F.3d 838 (9th Cir 2019) *US v Hisey*, 12 F.4th 1231 (10th Cir 2021).

The Court must vacate Hisey's criminal conviction because he isn't guilty of the predicate offense required for a conviction as a felon in possession of a firearm. Unfortunately, Hisey spent several years in prison because of this error.

Defendant is asking that the 33 months she served on the gun charge be applied to her ^{2nd} federal sentence & that she be reduced a category and be resentenced.

CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the following:

upon the following addresses, by placing same in a sealed envelope, bearing sufficient postage
for the delivery via United States mail Service to:

which was hand delivered to prison authorities on the grounds of the Federal Medical Center,

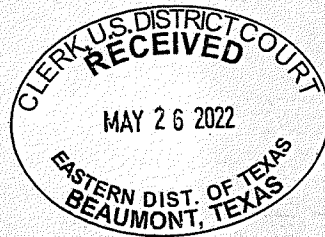
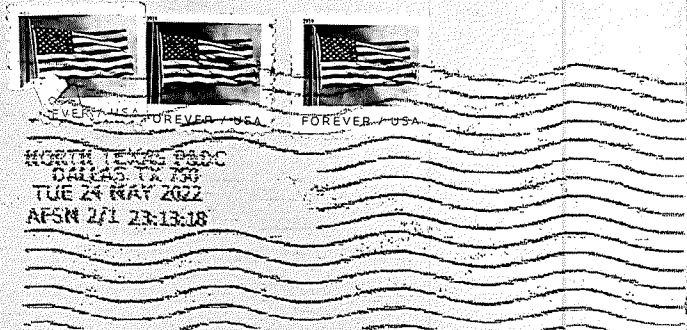
Carswell in Fort Worth, Texas on this 23RD day of May, 2022.

Vicki Stark Fitts

Litigation is deemed FILED at the time it was delivered to prison authorities. See: Houston v. Lack, 101 L.Ed. 2d 245 (1988).

⇐18614-078⇐

Vicki Fitts
2 South
PO BOX 27137***
FORT-Worth, TX 76127
United States



⇐18614-078⇐

Us Dist Ct Eastern Dist Of Tx
Mr. David O'toole
300 Willow ST
Beaumont, TX 77701
United States

Legal
Mail